

Applicability of Ch. NR 135 and Chapter 30/ Ch. NR 340 Wis. Adm. Codes to Non-Metallic Mine Sites

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Description:

Nonmetallic mining operations are present in a wide variety of locations throughout the State of Wisconsin. Chapter 30, Wis. Stats. and Ch. NR 340, Wis. Adm. Code are designed to protect the Waters of the State and were in existence prior to the promulgation of ch. NR 135 Wis. Adm. Code “*Nonmetallic Mining Reclamation*” in 2000. Mines, their support facilities or other activities that are located or proposed to be sited in, or adjacent to, navigable waterways, clearly fall within and are regulated under Chapter 30, Wis. Stats. Mine operators who are required to obtain permits from the department under Ch. 30, Wis Stats., must demonstrate that the proposed mine meets the statutory standards in Ch. 30, Wis. Stats. and comply with the requirements of Ch. NR 340, Wis. Adm. Code.

Chapter NR 135 Wis. Adm. Code “*Nonmetallic Mining Reclamation*” was promulgated with the intent of establishing reclamation criteria to mines where there had previously been no jurisdiction under Chapter 30, Wis. Stats. The reclamation standards in Ch. NR 135, Wis. Adm. Code were specifically created to apply to those “upland” areas outside the immediate vicinity of a navigable waterway and beyond the jurisdiction of Chapter 30, Wis. Stats. and Ch. NR 340, Wis. Adm. Code, and to establish statewide performance standards for the reclamation of nonmetallic mine sites. The result is that all nonmetallic mine operators must comply with the uniform statewide reclamation standards promulgated in Ch. NR 135 Wis. Adm. Code as required by Ch. 295 Wis. Stats. regardless of the location of the operation with respect to navigable waterways. Administration and enforcement of the rules and standards in Ch. NR 135, Wis. Adm. Code, is statutorily delegated to County regulatory authorities (RA)s, who enact reclamation ordinances and administer NR 135, Wis. Adm. Code reclamation programs. Reclamation programs, while mandatory for counties, are permissible for cities, villages and towns should they elect to enact their own ordinances and serve as RAs.

Need:

Since the promulgation of ch. NR 135, uncertainty regarding the proper jurisdiction and roles for water and waste program staff has been documented in several instances, and some statutory changes have occurred which modify the department’s jurisdiction under Ch. 30, Wis. Stats. Consequently, certain aspects of the rules can cause uncertainty in determining the applicable jurisdiction. Mines and facilities located in or adjacent to navigable waterways are specifically exempted from regulation under ch. NR 135 Wis. Adm. Code. While the mines and associated facilities that are regulated by Chapter 30, Wis. Stats. and Ch. NR 340, Wis. Adm. Code are exempt from obtaining county approval under Ch. 135, Wis. Adm. Code, mine operations, support facilities and activities are not exempt from the uniform statewide reclamation standards contained in ch. NR 135 Wis. Adm. Code. Further, it is also important to note that while Ch. NR 135, Wis. Adm. Code applies only to reclamation activities, under Chapter 30, Wis. Stats., permit conditions may apply to both the mining operations as well as the reclamation activities.

The intent of this document is to help clarify the jurisdiction and roles of the department water and waste program staff and Counties in regulating nonmetallic mining sites, to assist both Water and Waste & Materials Management Programs in providing clear and consistent jurisdictional determinations and to improve communication with counties and the regulated community.

Applicability

Nonmetallic mining operations typically fall within the Department's jurisdiction under Ch. 30, Wis. Stats and require an individual permit from the DNR if they engage in any of the following:

- Creation of a pond within 500 feet of a navigable water or connected to a navigable water under s. 30.19(1g)(a) and (am), Wis. Stats.;
- Grading¹ or the removal of topsoil in excess of 10,000 square feet on the banks of a navigable water under s. 30.19(1g)(c);
- Dredging or the removal of material from the bed of a navigable stream or lake under s. 30.20, Wis. Stats; or
- Changing the course or straightening a navigable stream under s. 30.195, Wis. Stats.

Nonmetallic mining operations that require a permit under ss. 30.19, 30.195 or 30.20, Wis. Stats., are also required to comply with the requirements in Ch. NR 340, Wis. Adm. Code and the statewide reclamation standards established in Ch. NR 135, Wis. Adm. Code that apply to all nonmetallic mining sites. Those nonmetallic mines or portions of a nonmetallic mine that are subject to the permit and reclamation requirements under s. 30.19, 30.195 or 30.20, Wis. Stats. and Ch. NR 340, Wis. Adm. Code, are exempt as from the permitting requirements in Ch. NR 135, Wis. Adm. Code. (Section 295.16(2), Wis. Stats. and Section NR 135.02, Wis. Adm.Code.

Those nonmetallic mining sites or portions of the site that do not fall within the regulatory jurisdiction of Ch. 30, Wis., must obtain reclamation permits under Ch. 295, Wis. Stats. and Ch. NR 135, Wis. Adm. Code. In other words if only a portion of the nonmetallic mine site is under the jurisdiction of Chapter 30, Wis. Stats., then the remainder of the mine site must be permitted under Ch. NR 135, Wis. Adm. Code. However, it should be emphasized that the uniform statewide reclamation standards promulgated in Ch. NR 135, Wis. Adm. Code apply to the reclamation of all nonmetallic mines, regardless of the location of the operation with respect to navigable waterways.

¹**Note:** 2011 WI Act 167 created two new grading exemptions under s. 30.19(1m), Wis. Stats. Please refer to Situation Four on page 6 for more details.

IMPLEMENTATION

The implementation of this interpretation of the rules is best illustrated through specific examples that relate to Chapter 30 jurisdiction, NR 135 jurisdiction, dual jurisdiction and through consideration of recent exemptions provided in s. 30.19(1m) Wis Stats. The following will illustrate and discuss of each of these four jurisdictional situations.

SITUATION ONE:

Chapter 30 requirements apply but ch. NR 135 permitting requirements do not apply:

- (a) **Operations removing material from the bed of a navigable waterway or changing the course of a stream.**

Mining operations such as these would be covered under Ch. 30, Wis. Stats. and require a ch. 340 Wis. Adm. Code permit for both their operation and reclamation. Examples would include mining in-stream sand and gravel bars or directly removing stream banks for sand and/or gravel.

- (b) **Operations that intend to grade in excess of 10,000 square feet located entirely on the bank of a navigable waterway.**

Mining operations that disturb more than 10,000 square feet of material and that are entirely located along the bank of a navigable waterway are regulated under Chapter 30, Wis. Stats. and must obtain a NR 340 Wis. Adm. Code permit for operations and reclamation unless the activity is exempt under s. 30.19(1m) Wis. Stats. (please refer to Situation Four below for further explanation of the exemptions).

SITUATION TWO:

Chapter NR 135 permitting requirements apply but Chapter 30 does not apply:

Operations entirely within upland areas that do not require a ch. 30 permit under ss. 30.19, 30.195 or 30.20, Wis. Stats.

Mining operations entirely within upland areas where there is no jurisdiction under Ch. 30, Wis. Stats, would be exclusively subject to reclamation rules and permitting under ch. NR 135 Wis. Adm. Code. Examples would include most sand and gravel operations, especially ones that are mining topographically prominent landscape features such as bluffs, drumlins and cuestas. Also included would be surface facilities and activities associated with underground industrial sand mines.

Note: s. 281.33 Wis. Stats. A stormwater discharge permit is required for nonmetallic mining.

SITUATION THREE:

Both ch. NR 135 Wis. Adm. Code and Chapter 30 permitting requirements may apply at a single operation. These dual jurisdictions tend to be dynamic and both permitting requirements may be applicable to all or portions of the operation during the life of the mine:

- (a) The majority of the mining operation is in upland areas regulated under NR 135, but a portion of the mining falls under Chapter 30 jurisdiction.**

When any portion of the actual mining activity is regulated under s. 30.19, 30.195 or 30.20 Wis. Stats., and is not exempt under s. 30.19(1m) Wis. Stats., then that portion of the mining activity is subject to the requirements of ch. NR 340 Wis. Adm. Code. However, the remainder of the mining activity, which may be located in the upland area, is subject to regulation under ch. NR 135 Wis. Adm. Code and the RA. While splitting regulation of the site may be unwieldy, it is the **clear intent of both ch. NR 135 Wis. Adm. Code and ch 295, Stats. that only the portion of the site subject to regulation under Chapter 30 would be exempt from regulation under ch. NR 135 Wis. Adm. Code.**

While this results in two separately administered areas, the reclamation standards for both programs are essentially the same. Most reclamation plans also include both phased operations and contemporaneous reclamation regardless of the regulating authority. An operator has the ability to reclaim the portion of the site, which is subject to regulation under ch. NR 340 Wis. Adm. Code, while continuing operations in the upland portion of the site that are subject to Ch. NR 135 Wis. Adm. Code. This provides an incentive for mine operators to reclaim the portion of the site subject to ch. NR 340 Wis. Adm. Code as soon as practical to avoid dealing with two separate regulatory requirements.

Note: It is important for the local Water Management Specialist and the RA's to work closely with one another on projects to determine who has jurisdiction and to synchronize the reclamation activities for both areas.

- (b) The majority of the mining operation is regulated under NR 135, but the mine has related structures or facilities that fall under Chapter 30 jurisdiction.**

While actual mining may not be taking place, mine operations sometimes have related structures or facilities such as roads, bridges, rail spurs, processing plants or stockpiles located near or adjacent to a waterway. These structures or facilities are required to obtain permits under Ch. 30, Wis. Stats., whereas areas where the actual nonmetallic mining operations is taking place or is planned would be regulated and require reclamation permits under Ch. NR 135, Wis. Adm. Code.

Situations may also arise where an upland nonmetallic mining operation cannot internally manage the stormwater from a mining site and must construct stormwater control basins or ponds that discharge to a waterway. If the stormwater control basins or ponds are within 500 feet of a navigable waterway or are connected to a navigable waterway, the ponds would be subject to regulation under Chapter 30, Wis. Stats. and Ch. NR 340 Wis. Adm. Code.

Note: If any portion of the mining operation or the related structures and facilities will impact wetlands, permits will be required from the department under s. 281.36 and potentially from the US Army Corps of Engineers in addition to any permits that may be required under Ch. 30, Wis. Stats. and Chs. NR 135 and 340, Wis. Adm. Code.

SITUATION FOUR:

Situations that are affected by new exemptions under s. 30.19(1m) Wis Stats.

Under 2011 WI Act 167 two new exemptions were created under s. 30.19(1m), Wis. Stats. which apply to grading operations that exceed 10,000 square feet of disturbance on the banks of navigable waterway. Grading permits under Ch. 30.19, Wis. Stats. are no longer required if the project is authorized under a stormwater discharge permit issued under s. 283.33, Wis. Stats., or a county issues a grading permit under its shoreland zoning ordinance that has been created under s. 59.692, Wis. Stats. It is important to note that these new exemptions do not apply to the construction of ponds that connect to or are located within 500 feet of a navigable waterway or mines and facilities that impact wetlands.

These exemptions could apply to mining sites, structures and other facilities that support but are not contiguous to nonmetallic mines sites, if the mining sites and support structures or facilities must obtain stormwater discharge permits from the department or shoreland grading permits from the county. If the grading is exempt under s. 30.19(1m), Wis. Stats., then a reclamation permit will be required under Ch. NR 135, Wis. Adm. Code.

It is the department's recommendation that the mining operator contact the local Water Management Specialist to determine if the exemptions will apply to the site. To ensure consistency in informing operators, communication between the WMS, the county zoning department and the DNR's Stormwater contacts will be essential.

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Contact (608) 266-2111 or DNRWasteMaterials@wisconsin.gov for further information.

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